TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 158.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE RHODE ISLAND LOCOMOTIVE WORKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1874.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, on Monday, the fifteenth day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

J. A. JONES, *Clerk.*

RHODE ISLAND LOCOMOTIVE WORKS
vs.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } In replevin.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

The Rhode Island Locomotive Works, a corporation located and doing business in the State of Rhode Island, plaintiff, puts in its place Messrs. Hay, Greene, and Littler, its attorneys, against the Indianapolis,
2 Bloomington and Western Railway Company, a corporation doing business and located in the said southern district of Illinois, defendant, who puts in its place Messrs. Ingersoll, Puterbaugh Bros. and McCune, and J. C. Black, esq., its attorneys, in a plea wherefore the said defendant took the goods and chattels of the plaintiff and unjustly detained the same against sureties and pledges.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the seventh day of February, in the year of our Lord one thousand eight hundred and seventy-three, came said plaintiff, by its said attorneys, and filed in the office of the clerk of the circuit court of the United States for said district its bond for costs and affidavit, which said bond for costs and affidavit are in the words and figures following, to wit:

Bond for costs.

In the circuit court of the United States for the southern district of Illinois.

THE RHODE ISLAND LOCOMOTIVE WORKS, A corporation existing under the laws of the State of Rhode Island,
3 *v.*
THE INDIANAPOLIS, BLOOMINGTON & Western Railway Company, a corporation existing under the laws of the State of Illinois. } Replevin.

We do hereby enter ourselves security for costs in the above-entitled cause, and acknowledge ourselves bound to pay all costs that may accrue in said action either to the opposite party or to the officers of this court in pursuance of law.

February 7th, 1873.

HAY, GREEN & LETTLER.

(Endorsed:) Filed February 7, 1873. J. A. Jones, clk.

REC. 158—1

Affidavit.

In the circuit court of the United States for the southern district of Illinois.

Daniel R. Larned, being sworn in due form of law, upon his oath deposes and says, that he is agent of the Rhode Island Locomotive Works, a corporation created and existing under the laws of the State of Rhode Island, and which said corporation is a citizen and resident of said State of Rhode Island; that said Rhode Island Locomotive
4 Works is the owner of and lawfully entitled to the immediate possession of a certain locomotive-engine named Horace Hayward No. 2, of the value of twelve thousand dollars, and that the same is unlawfully detained from the said locomotive-works in the southern district of Illinois by the Indianapolis, Bloomington & Western Railway Company, a corporation created and existing under the laws of the State of Illinois, and which said corporation is a citizen and resident of the State of Illinois.

Affiant further says that said locomotive-engine has not been taken for any tax assessment or fine levied by virtue of the laws of the State of Illinois or the United States, nor seized under any execution or attachment against the goods and chattels of the Rhode Island Locomotive Works liable to execution or attachment.

DANIEL R. LARNED.

Subscribed & sworn to before me this 7th day of February, A. D. 1873.

J. A. JONES, *Clk.*

(Endorsed:) Filed February 7th, 1873. J. A. Jones, clk.

5 Afterward, to wit, on the said seventh day of February of the year aforesaid, a writ of replevin was issued out of said clerk's office in said cause, which said writ of replevin, with return of marshal thereon endorsed, is in the words and figures following, to wit:

Replevin.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

The United States of America to the marshal of the southern district of Illinois, greeting:

If the Rhode Island Locomotive Works shall give you bond and sufficient security to prosecute its suit with effect against the Indianapolis, Bloomington and Western Railway Company, and to make return of the following-described property, to wit, a locomotive-engine named "Horace Hayward, No. 2," in said southern district of Illinois, which the said Indianapolis, Bloomington and Western Railway Company has and unlawfully detains from the said Rhode Island Loco-
6 motive Works, as it by its agent alleges, if return thereof shall be awarded, and, further, to save and keep you harmless in replevying said property, then we command you that you cause the above property to be replevied and delivered to the said Rhode Island Locomotive Works, and that you summon the said Indianapolis, Bloomington and Western Railway Company, if it be found in your district, to

be and appear before our judge of our circuit court of the United States for the southern district of Illinois, at the next term thereof to be holden at Springfield, in the district aforesaid, on the first Monday of June next, to answer the complaint of the said Rhode Island Locomotive Works for the detention of the said property; and have you then there this writ, together with the bond to be taken from the said Rhode Island Locomotive Works.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Springfield aforesaid, on this seventh day of February, in the year of our Lord one thousand
7 eight hundred and seventy-three, and of our Independence the ninety-seventh year.

[L. S.] J. A. JONES, *Clerk.*

(Endorsed:)

Executed this writ on the 10th day of February by replevying the within-described engine "Horace Hayward No. 2," and by delivering possession of the same to the within-named Rhode Island Locomotive Works; and I further certify that I duly summoned the within-named Indianapolis, Bloomington and Western Railway Company, by reading this writ to C. W. Smith, gen'l manager of said company, as I am herein commanded.

E. R. ROE, *U. S. Marshal.*
By JOHN F. RITTENHOUSE,
Deputy.

(Also endorsed:) Filed May 6th, 1873. J. A. Jones, Clerk.

And afterwards, to wit, on the thirteenth day of said May, of the year aforesaid, came again said plaintiff, by its said attorneys, and filed in said clerk's office its declaration herein, which said declaration is in the words and figures following, to wit:

8 Circuit court, June term, A. D. 1873.

Declaration.

UNITED STATES OF AMERICA,
Southern District of Illinois:

THE RHODE ISLAND LOCOMOTIVE WORKS
vs.
THE INDIANAPOLIS, BLOOMINGTON & WESTERN Railway Company. } In replevin.

The Rhode Island Locomotive Works, a corporation existing under and by virtue of the laws of the State of Rhode Island, and a resident and citizen of said State of Rhode Island, and the plaintiff in this suit by Hay, Green & Lettler, its attorneys, complains of the Indianapolis, Bloomington and Western Railway Company, a corporation existing under and by virtue of the laws of the State of Illinois, which is a resident and citizen of the said State of Illinois and the district aforesaid, and the defendant in this suit of a plea, wherefore the said defendant took the goods and chattels of the plaintiff and unjustly detained the same against sureties and pledges, until, &c.

For that the defendant, to wit, on the 7th day of February, A.
9 D. 1873, to wit, at the district aforesaid, took the goods and chattels of the said plaintiff, to wit, a certain locomotive-engine of the plaintiff named Horace Hayward No. 2, of great value, to wit, of the value of $12,000, and unjustly detained the same against sureties and pledges, until, &c.

And also wherefore the defendant unjustly detains the goods and chattels of the plaintiff against sureties and pledges, etc. For that the defendant, to wit, on the 7th day of February, A. D. 1873, to wit, at the district aforesaid, the goods and chattels of the plaintiff, to wit, a certain locomotive-engine of the plaintiff, named Horace Hayward No. 2, of great value, to wit, of the value of $12,000, unjustly detained against sureties and pledges.

Wherefore the said plaintiff saith it is injured and hath sustained damage to the amount of $500, and therefore it brings its suit by—

HAY, GREENE & LETTLER,
Its Attorneys.

(Endorsed:) Filed May 13th, A. D. 1873. J. A. Jones, clk.

10 Then afterwards, to wit, on the seventh day of June of the year aforesaid, came the defendant by it said attorneys and filed in said clerk's office its pleas herein, which said pleas are in the words and figures following, to wit:

Pleas.

Circuit court, June term, 1873.

UNITED STATES OF AMERICA,
Southern District of Illinois:

THE INDIANAPOLIS, BLOOMINGTON & WESTERN Railway Company *ats.* THE RHODE ISLAND LOCOMOTIVE WORKS. } Replevin.

And the said defendant comes and defends the wrong and injury, when, etc., and says that it did not wrongfully detain the goods and chattels in said declaration mentioned, or any part thereof, in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country, etc.

By INGERSOLL, PUTERBAUGH BRO. & McCUNE,
Its Attys.

11 And for a further plea in this behalf, the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the said goods and chattels in the said declaration mentioned at the said time when, etc., was the property of it, the defendant, and not of the plaintiff as by the said declaration is above supposed; and this the defendant is ready to verify. Wherefore, etc.

By INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Its Attys.

And for a further plea in this behalf, the defendant says that the

plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the said property mentioned in the said declaration, to wit, the locomotive-engine, Horace Hayward No. 2, at the said time when, etc., was the property of the Chicago and Illinois Southern Railroad Company and not of the plaintiff, as by the said declaration is above supposed; and this the defendant is ready to verify. Wherefore it prays judgment, a return of the property, damages, and costs, etc.

By INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Its Attys.

12 And for a further plea in this behalf, the defendant says that the plaintiff ought not to have its aforesaid action against it, the defendant, because it says that the said property mentioned in the said declaration, to wit, the locomotive-engine, Horace Haywood No. 2, at the said time when, etc., was the property of J. Edwin Conant & Company, and not of the plaintiff as by the said declaration is supposed; and this the said defendant is ready to verify. Wherefore it prays judgment, etc.

By INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Its Attys.

(Endorsed:) Filed June 7, A. D. 1873. J. A. Jones, clk.

Now afterwards, to wit, on the twenty-fourth day of June, in the June term of said court of the year aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

Order for hearing.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } In replevin.

13 This day come the parties by their attorneys, and by consent this cause is set for hearing on Thursday, the twenty-sixth day of June inst.

Afterwards, to wit, on the first day of July, in the time and year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order to reduce testimony to writing, &c.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } In replevin.

This day come the parties by their attorneys, and by consent the evidence this day heard is to be reduced to writing, and this cause continued at cost of defendant.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the costs and charges by it about its suit at this term expended, and that it have execution therefor.

14 And afterwards, to wit, on the seventeenth day of October, at the October adjourned term of said court of the year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of continuance, October term, '73.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } Replevin.

It is ordered by the court that this cause be continued.

Then afterwards, to wit, on the seventh day of January, in the January term of said court, in the year of our Lord one thousand eight hundred and seventy-four, the following further proceedings were had in said court in said cause, and entered of record, to wit:

15 *Order for hearing.*

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } Replevin.

This day come the parties by their attorneys, and by consent this cause is set for hearing on Wednesday, the twenty-first day of January inst.

Now afterwards, to wit, on the twenty-first day of said January, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of continuance, Jan'y T., '74.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } Replevin.

By consent of parties, by their attorneys, this cause is continued.

16 Afterwards, to wit, on the twelfth day of June, in the June term of said court, of the year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Trial by court.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } Replevin.

This day comes as well the plaintiff, by Messrs. Hay, Green and Lett-

ler, its attorneys, as the defendant, by J. C. Black, esq., and R. J. Ingersoll, esq., its attorneys, and the issue joined by consent is tried by the court, a jury being waived; and the court having heard the evidence and argument by counsel, take the same under advisement.

And afterwards, to wit, on the fifteenth day of said June, in the term and year last aforesaid, the following further proceedings were had
17 in said court in said cause, and entered of record, to wit:

Judgment.

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company. } Replevin.

This day come again the parties by their attorneys, and the court being now sufficiently advised in the premises, finds the issue for the plaintiff, and that the defendant did wrongfully detain the goods and chattles in the declaration mentioned, to wit, a certain locomotive-engine named Horace Haywood, No. 2. The court also finds that the plaintiff is entitled to retain the possession of the property replevied, and assesses its damages to the sum of one cent.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant its damages aforesaid assessed, together with the sum of dollars and cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor.

18 Whereupon defendant tenders its bill of exceptions, which is signed, sealed, and ordered by the court to be made part of the record herein.

Bill of exceptions.—Contract between plff. & Conant.—Exhibit A.

United States circuit court, June term, 1874.

UNITED STATES OF AMERICA,
Southern district of Illinois:

RHODE ISLAND LOCOMOTIVE WORKS
v.
INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Co.

Be it remembered that on the trial of this cause the plaintiff, to sustain the issues on his part, introduced their written contracts made between plaintiff and J. Edwin Conant & Co., marked A, B, C, the execution of which was by defendant admitted.

This agreement, made this thirteenth day of September, eighteen hundred & seventy-one, by and between the Rhode Island Locomotive Works, of Providence, R. I., party of the first part, and J. Edwin Conant & Co., contractors for the Chicago and Illinois Southern
19 Railroad Company, party of the second part, witnesseth:

That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Olney, No. 4, and whereas the said party of the second part is desirous of using and eventually

of purchasing the same, now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part the said one locomotive-engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner in transacting the business of the said railroad, and in consideration thereof the said party of the second part hereby covenants and agrees to pay to the said party of the first part, for the use and rent of the same, the sum of twelve thousand ninety-three & $\frac{96}{100}$ dollars in notes, as follows:

20	10 % cash	1,150 00
	One note, due March 16, 1872	3,580 16
One	" June 16, 1872	3,647 90
One	" September 16, 1872	3,715 90
		$12,093 96

And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collis'on, by running off the track, or by fire, or destruction from any cause, is not to be considered reasonable and ordinary wear and tear. And the said party of the first part in consideration of the foregoing, further covenants and agrees that in case the said party of the second part shall pay the said notes promptly as hereinbefore set forth, upon payment of the last-mentioned note, viz, thirty-seven hundred fifteen & $\frac{00}{100}$ dollars, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of
21 the second part, its legal representatives, successors, & assigns forever.

And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payment' when due, then the said party of the first part shall be at liberty, and it shall be lawful for it to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of the said party of the second part.

And the said party of the second part further covenants and agrees that in case of any default on its part in any of the payments as hereinbefore provided, it will within thirty days thereafter deliver the said one locomotive-engine and tender to the said party of the first part.

And the said party of the first part shall thereafter, upon thirty days' written notice to the said party of second part of the time and place of sale, proceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sale first, to the payment of the expenses of the sale; second, to the payment of any balance then due or thereafter to become due, for or on account of the rent as hereinbefore pro-
22 vided. And if after these payments there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber, or in any way dispose of said one locomotive-engine and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said locomotive-engine and tender shall and does remain in the Rhode Island Locomotive Works as fully to all intents and purposes as though the lease had not been made. And the said party of the first part hereby covenants and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the time hereinbefore specified, without any let or hindrance or delay
23 whatever, as to any or either of said payments, that upon the last-mentioned payment, viz, thirty-seven hundred fifteen & $\frac{20}{100}$ dollars, and all renewals being made as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall ipso facto by the completion of such payment rest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company.

In witness whereof the parties hereto have herennto set the corporate seal by the respective officers duly authorized.

RHODE ISLAND LOCOMOTIVE WORKS,
EDW. P. MASON, *Treasurer.*
J. EDWIN CONANT & CO.

SEAL RHODE ISLAND LOCOMOTIVE WORKS, PROVIDENCE, R. I.

(Endorsed:) Filed Jan'y 15th, 1873, at 2 o'clock, p. m., and recorded in book of deeds No. 35, on pages 312 & 313. A. H. Chapman, recorder.

(Endorsed:) Filed June 15th, A. D. 1874. J. A. Jones, clerk.

Contract between Plff. & Conant.—Ex. B.

24 This agreement, made this twenty-first day of August, eighteen hundred and seventy-one, by and between the Rhode Island Locomotive Works, of Providence, R. I., party of the first part, and J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., party of the second part, witnesseth:

That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Alfred N. Smyser, No. 3, and whereas the said party of the second part is desirous of using and eventually purchasing the same: Now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part the said one locomotive-engine and tender, with the right to place the same upon its railroad, and to use the same in the
25 usual manner in transacting the business of the said railroad, and in consideration thereof the said party of the second part hereby

consents and agrees to pay to the said party of the first part for the use and rent of the same the sum of twelve thousand ninety-three dollars & $\frac{96}{100}$ in notes, as follows:

10 %cash	1,150 00
One note due February 24th, 1872	3,580 16
One " " May 24, 1872	3,647 90
One " " August 24, 1872	3,715 90
	$12,093 96

And the said party of the second part hereby further covenants and agrees during the time hereby demised to keep and maintain the said one locomotive-engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collision, by running off the track, or by fire, or by destruction from any cause, is not to be considered reasonable and ordinary wear and tear. And the said party of the first part, in consideration of the foregoing, further covenants and agrees that in case said party of the second part shall pay the said notes promptly as hereinbefore set forth, upon payment of the last-mentioned note, viz,
26 thirty-seven hundred & fifteen $\frac{90}{100}$ dollars, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of the second part, its legal representatives, successors, and assigns forever.

And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payment' when due, then the said party of the first part shall be at liberty, and it shall be lawful for it, to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of the said party of the second part.

And the said party of the second part further covenants and agrees that in case of any default on its part in any of the payments as hereinbefore provided, it will, within thirty days thereafter, deliver the said one locomotive-engine and tender to the said party of the first part.

And the said party of the first part shall thereafter, upon thirty days' written notice to the said party of the second part of the time and place of sale, proceed to sell the said one locomotive-engine and tender,
27 and shall apply the proceeds of such sale first, to the payment of the expenses of the sale; second, to the payment of any balance their due, or thereafter to become due, for or on account of the rent as hereinbefore provided. And if after these payments there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber, or in any way dispose of said one locomotive-engine and tender or employ them during the term of this lease, in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern R. R. Co., or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said one locomotive-engine and tender shall and does remain in the Rhode Island

Locomotive Works as fully, to all intents and purposes, as though the lease had not been made.

28 And the said party of the first part hereby consents and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the time hereinbefore specified, without any let or hinderance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz, thirty-seven hundred fifteen & $\frac{90}{100}$ dollars, and all renewals being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall ipso facto by the completion of such payment rest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co.

In witness whereof the parties hereto have hereunto set the corporate seal by the respective officers duly authorized.

RHODE ISLAND LOCOMOTIVE-WORKS,
EDW. P. MASON, *Treasurer.*
J. EDWIN CONANT & CO.,
Contractors C. & Ill. So. R. R.

SEAL. RHODE ISLAND LOCOMOTIVE-WORKS. PROVIDENCE, R. I.

(Endorsed:)

STATE OF ILLINOIS,
Cumberland County:

29 I hereby certify that the within instrument was filed in this office for record on the 28 day of January, 1873, at 2 o'clock p. m., and duly recorded in book D of mortgages, page 485, and examined.

ANDREW CARSON,
Clerk and Ex-officio Recorder.

(Endorsed:) Filed June 15th, A. D. 1874. J. A. Jones, clerk.

Contract between plff. & Conant.—Exhibit C.

This agreement, made this eleventh day of May, eighteen hundred and seventy-one, by and between the Rhode Island Locomotive Works, of Providence, R. I., party of the first part, and J. Edwin Conant & Company, contractors for the Chicago & Illinois Southern Railroad Company, party of the second part, witnesseth:

That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Horace Haywood, No. 2, and whereas the said party of the second part is desirous of using and eventually purchasing the same: Now, therefore, in consideration of the sum of one dollar to the said party of the first by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part, the said one locomotive-engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner in transacting the business of the

30

said railroad; and in consideration thereof the said party of the second part hereby covenants and agrees to pay to the said party of the first part, for the use and rent of the same, the sum of twelve thousand ninety-three and $\frac{96}{100}$ dollars, as follows:

10% cash		1,150 00
One note due	November 13th, 1871	3,580 16
One note "	February 13th, 1872	3,647 90
One do. "	May 13th, 1872	3,715 99
		$12,093 96

And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in as good condition as it now
31 is, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collision, by running off the track or by fire, or destruction from any cause, is not to be considered reasonable and ordinary wear and tear.

And the said party of the first part, in consideration of the foregoing, further covenants and agrees that in case the said party of the second part shall pay the said notes promptly, as hereinbefore set forth, upon payment of the last-mentioned note, viz, thirty-seven hundred fifteen and $\frac{96}{100}$ dollars, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is; to have and to hold the same to the said party of the second part, its legal representatives, successors, and assigns forever.

And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payments when due, then the said party of the first part shall be at liberty and it shall be lawful for it to enter upon and take possession of the said one locomo-
32 tive-engine and tender, and to that end to enter upon the road and other property of the said party of the second part.

And the said party of the second part further covenants and agrees that in case of any default on its part in any of the payments as hereinbefore provided, it will within thirty days thereafter deliver the said one locomotive-engine and tender to the said party of the first part; and the said party of the first part shall thereafter, upon thirty days' written notice to the said party of the second part of the time and place of sale, proceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sale, first, to the payment of the expenses of the sale; second, to the payment of any balance their due or thereafter to become due for or on account of the rent as hereinbefore provided. And if after these payment there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber, or in any way dispose of said one locomotive-engine
33 and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full

legal right and title of said one locomotive-engine and tender shall and does remain in the Rhode Island Locomotive Works as fully, to all intents and purposes, as though the lease had not been made.

And the said party of the first part hereby covenants and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the time hereinbefore specified, without any let or hinderance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz, thirty-seven hundred fifteen and $\frac{00}{100}$ dollars, and all renewals being made, as well as each and all of the other said payments, the said party of the first
34 part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall ipso facto by the completion of such payment rest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company.

In witness whereof the parties hereto have hereunto set the corporate seal by the respective officers duly authorized.

(Signed) RHODE ISLAND LOCOMOTIVE WORKS,
EDW. P. MASON, *Treasurer.* { CORPORATE SEAL OF COMPANY. }
(Signed)
J. EDWIN CONANT & CO., *Contractors.*

(Endorsed:) Recorded in lease record No. one, on page 179 to 182 inclusive, Jany. 17, 1873. Filed. A. Pentecost, R. P. C.

(Endorsed:) Filed for record Jany. 17th, 1873, at 11 & 10 o'clock a. m.

(Endorsed:) Filed June 15, A. D. 1874. J. A. Jones, clerk.

It was also admitted that Conant also paid no part of the principal of the purchase-money, except the amount admitted on the face of
35 said contracts, and that Conant & Co. obtained possession of said engines under said agreement.

It was admitted that the plaintiff was duly incorporated under the laws of Rhode Island; and it was found the plaintiff was doing business in that State as a corporate body, & that Conant & Co. resided in New York; that the contracts referred to were signed by the plaintiff in Rhode Island, were then sent to New York, and were returned to Rhode Island signed by Conant & Co., having been sent to New York for that purpose.

Testimony of C. W. Smith.

Defendant introduced C. W. SMITH, who testified that he is manager of the I. B. & W. R. R.; that as such, he bought the engine Horace Hayward, No. 2, of Jacob Rudy, Jan. 11, 1873, for $3,500; knew of no claim in plaintiff or any other party to said engine when he bought the same; understood that said engine had been bought at sheriff's sale as the property of Conant & Co.; did not know of his own knowledge that the I. B. Company had bought a number of engines of plaintiff under contracts like that read in evidence, but understood this to be the fact officially.

Testimony of Virgil Curd.

VIRGIL CURD testified that, as deputy sheriff, he sold the en-
36 gine' Smyser and Hayward as shown by the returns to the special execution; sold at Mat'oon, Coles County, and that the engines

were present; sold the Smyser to Dale for Dale & Able, and the Hayward to Jacob Rudy, each for $1,000.

Testimony of Philip Campbell.

PHILLIP CAMPBELL testified that, as agent for Hervey, he purchased the Smyser of Dale and Able for $3,000; thought he made the purchase about the last of December, 1872.

Testimony of Parker.

PARKER testified that the engines were purchased by Conant & Co., of the plaintiff in 1871, and were being used on the Decatur, Sullivan and Mattoon R. R.; Conant & Co. failed not long after. The directors of the road took forcible possession of it and the rolling-stock in 1872; an arrang'ment was made with the consent of Conant & Co. by which the road with the stock on it was turned over to Mr. Ingersoll, president of the Cleveland Iron Company, for the purpose of operating the same, and making the debt due the Cleveland Iron Company from Conant & Co. This did not include the Smyser or the Hayward, they being
37 in the hands of the sheriff; but this did include the engine Olney. Conant & Co. were then indebted to the Cleveland Iron Company more than $100,000.

Cross-ex.:

In useing the word "purchased" I mean Conant & Co. obtained the engines under the contracts read in evidence.

Testimony of M. L. Saunders.

M. L. SAUNDERS testified he was general manager of the D. S. & M. R. R. and had possession of the engine Olney under Ingersoll from the time he, Ingersoll, obtained it up to the 3d day of Jan., 1873. When the road was transferred to the Paris & Decatur Company this engine was also transferred on said day under the terms of the lease read
38 in evidence, marked "Exhibit D." While he was manageing the road for Ingersoll, Mr. Mason, plaintiff's treasurer, sent him papers marked "E & F," as claims against the company.

Claim of plff.—Exhibit E.

(Copy.)

PROVIDENCE, *July 27th*, 1872.

Chicago & Illinois Southern R. W. Y. Co. to Rhode Island Locomotive Works, Dr.

1872.			
Jan'y	4.	Cash paid, note	3,647 12
Feb'y	17.	Do. do. do. & protest	3,651 16
	7.	Note due this day charged back	3,734 95
	24.	Cash paid, note	3,580 16
Mar.	4.	Do. do. do.	3,693 64
"	18.	Do. do. do. & protest	3,582 51
April	4.	Do. do. do.	3,715 90
"	17.	Do. do. do.	4,942 73

May 18.	Do.	do.	do. & protest	3,719 90
" 25.	Do.	do.	do.	3,652 47
June 16.	Do.	do.	do.	3,647 90
July 19.	Do.	do.	do. & protest	5,035 72
				$46,604 16

CR.

Jan. 1. By note, 60 da., date	3,693 64		
Less int. at 9½ % b'k'ge & stamp	72 49		
		3,621 15	
April 15. By P. J. Avery's note indorsed by J. E. C. & Co., 90 days April 13	5,030 82		
Less int. at 8½ % b'k'ge & stamp	123 24		
		4,907 58	
			8,528 73
Due by average, April 16th, 1872			$38,075 43
July 27. 102 days' interest to date, at 7 %			755 15
			$38,830 58
39 MEMO. 1 note due 24 August			3,715 90
1 do. " 16 September			3,715 90

STATE OF RHODE ISLAND, &C.,
City & County of Providence, ss :

Be it known that in the said city of Providence, on this ninth day of August, A. D. one thousand eight hundred and seventy-two, before me, Henry Martin, a notary public for said county, personally appeared Earl P. Mason, known to me to be the treasurer of the Rhode Island Locomotive Works, and made oath that the above account is just and true as it stands stated, and that he hath not, either directly or indirectly, received any part or portion thereof or security or satisfaction for the same.

Witness my hand and notarial seal at said Providence the day and year last afore written.

[SEAL.] (Sgd.) HENRY MARTIN,
Notary Public.

(Endorsed :) Filed June 15, 1874. J. A. Jones, clerk.

Claim of plff.—Exhibit F.

(Copy.)

40 Statement of engines furnished J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Rd. Co., by the Rhode Island Locomotive Works:

1871.		
April 5.	1 locomotive-engine, Joseph Welborn ✻ 1	11,500 00
May 10.	1 locomotive-engine, Horace Hayward ✻ 2	11,500 00
Aug. 21.	1 locomotive-engine, Alfred N. Smyser ✻ 3	11,500 00
Sept. 13.	1 locomotive-engine, Olney ✻ 4	11,500 00
		$46,000 00

(Endorsed :) Filed June 15, 1874. J. A. Jones, clerk.

This was about the last of July, 1872. When these papers were sent to the railroad co. the officers of the plaintiff understood that the R. R. Company had agreed to complete contracts of Conant & Co.

ISAAC KEYS testified: Took a contract in the spring of 1871 to build part of the road under Conant & Co. They then claimed to be the owners of three engines; contracted with them on the faith of that statement. These were all the engines they had.

Defendant then introduced in evidence transcript of judgment in circuit court Coles County, Illinois, in case of Hinkle, Codington and Co. vs. J. Edwin Conant & Co.

41 *Record from Coles County.*

In circuit court, October term, A. D. 1872.

UNITED STATES OF AMERICA,
State of Illinois, Coles County, ss:

Pleas before the honorable James Steele, judge of the 27th judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of Coles County, in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Charleston, in said county, on the fifth Tuesday (being the twenty-ninth day) of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-sixth.

Present, honorable James Steele, judge of the 27th judicial circuit of the State of Illinois.

JOHN BOYLE,
State's Attorney.
ALLEN M. BROWN,
Sheriff.

Attest:
HENRY C. WORTHAM,
Clerk.

And be it remembered that afterwards, to wit, on the seventh day of November, in the year aforesaid, it being the ninth judicial day of said term, there appears of record on the records of said court the
42 judgment and proceedings of said court in the words and figures following, to wit:

BENSON C. HINKLE, ISAAC V. CODDINGTON, and Stephen R. Coddington, *vs.* J. EDWIN CONANT, WILLIAM L. AVERY, AND Peavis J. Avery.	2559.	Asst. & at'achm't. in aid.

Now come the plffs., by Horace S. Clark, their atty., and shows unto the court that the defts. have had due notice of the pendency of this suit by publication of a notice in the Charleston Plaindealer, a weekly newspaper of general circulation, for the period of six consecutive weeks, &c.

And be it remembered that afterwards, to wit, on the day and year last aforesaid, there also appears the following orders and judgment of said court, to wit:

BENSON C. HENKLE, ISAAC V. CODDINGTON, and Stephen R. Coddington,
vs.
43 J. EDWIN CONANT, WILLIAM L. Avery, and Peavis I. Avery.
2559. Assumpsit and attachment in aid.

Now come the plffs., by Craig and Clark, their attys., and having shown unto the court by a previous order entered herein that proof of publication was duly made according to the statute, and the defendants, who were duly notified with process herein, being three times solemnly called in open court, come not, but make default; thereupon it is considered by the court that said plaintiffs have judgment by default against said defendants for their damages by them sustained by reason of the non-performance of the said defts.; and the court having assessed said plffs. damages to be two thousand two hundred and eighty-five dollars fifty-three cents—

It is finally ordered and adjudged by the court that the said plaintiffs recover of and from the said defendants the said sum of two thousand two hundred and eighty-five dollars and fifty-three , their damages aforesaid, together with their costs and charges in this behalf expended, by the clerk to be taxed, and that execution issue therefor, &c.,
44 according to law; and it is further ordered and adjudged by the court that a special execution issue herein against them to expose to sale the property levied upon by virtue of the attachment herein, to wit, one locomotive-engine, No. 2, known as the Horace Hayward.

And be it remembered that heretofore, to wit, on the fifteenth day of December, A. D. 1871, there was filed in the office of the clerk of the circuit court aforesaid a declaration in the words and figures following, to wit:

In the circuit court, to the April term, A. D. 1872.

STATE OF ILLINOIS, *Coles County:*

BENSON C. HINKLE, ISAAC V. CODDINGTON, Stephen R. Coddington, partners, doing business under the firm-name & style of Hinkle, Coddington & Co.,
v.
J. EDWIN CONANT, WILLIAM L. AVERY,
45 Pevis J. Avery, partners, under the firm-name and style of J. Edwin Conant & Co.
In assumpsit. Damages, $2,500.00.

The plaintiff in this case, by Clark & Craig, their attorneys, complain of the defendants of a plea of trespass on the case on promises; for that whereas the defendants, at the county and State aforesaid, were, on, to wit, the fourteenth day of December, A. D. 1871, and are still indebted to the plaintiffs in the sum of twenty-five hundred dollars for goods, wares, & merchandise before that time sold & delivered by the plaintiffs to the defendants at their request, and in a like sum of money before that time paid, laid out, and expended by the plaintiffs for the use of the defendants at their request; and in a like sum of money for so much money before that time had & received by the defendants to the use of the plaintiffs; and in a like sum of money for work, labor, and service done and performed by the plaintiffs for the defendants at their request; and in a like sum of money for so much money before that time due from

the defendants to the plaintiffs for the interest upon and for the forebearance of divers large sums of money before then due to the
46 plaintiffs from the defendants, and by the plaintiffs foreborne to the defendants for long spaces of time before then elapsed at the request of the defendants; and in a like sum of money for so much money then and there found due to the plaintiffs upon an account then & there stated between them, whereby the defendants became liable to pay to the plaintiffs the said several sums of money when they should be requested; and the defendants afterwards, to wit, on the day and year aforesaid, at the place aforesaid, in consideration of the premises, promised to pay the said several sums of money to the plaintiffs on request; yet the defendants have not, though often requested, paid the said several sums of money to the plaintiffs, *though often requested so to do*, to the damage of the plaintiff twenty-five hundred ; and they sue, &c.

By CLARK & CRAIG,
Their Attorneys.

Upon the back of which said declaration is the following endorsements, to wit: "Clerk please issue. Clark & Craig, attys. for pfs."
"Filed Dec. 15th, 1871. H. C. Wortham, clerk."

47 Upon which a summons was issued in the words and figures following, to wit:

STATE OF ILLINOIS,
Coles County, ss:

The people of the State of Illinois to the sheriff of Coles County, greeting:

We command you that you summon J. Edwin Conant, William L. Avery, and Peavis J. Avery, partners, under the firm-name and style of J. Edwin Conant & Co., if to be found in your county, to be and appear before the circuit court of Coles County, on the first day of the next term thereof, to be holden in Charleston, on the first Tuesday of the month of April, 1872, to answer Benson C. Hinkle, Isaac V. Coddington, and Stephen R. Coddington, partners, doing business under the firm-name and style of Hinkle, Coddington & Co., of a plea of assumpsit; damages, $2,500.00.

Witness H. C. Northam, clerk of said court, and the judicial seal thereof, at Charleston, this 15th day of December, A. D. 1871.

[SEAL.] H. C. NORTHAM, *Clerk.*

48 Upon the back of which said summons is the following endorsement, to wit: "Mar. 23d, 1872, the within-named defendants not found in my count'. A. M. Brown, S. C. C. Ret. 10 cts. By J. J. Beall, dep.

And be it remembered that on the day and year last herein aforesaid there was filed in the office of the clerk of the circuit court aforesaid an affidavit in the words and figures following, to wit:

In the circuit court, to the April term, A. D. 1872.

STATE OF ILLINOIS, *Coles County:*

BENSON C. HENKLE, ISAAC V. CODDINGTON, Stephen R. Coddington, partners, doing business under the firm-name & style of Hinkle, Coddington & Co.
vs.
J. EDWIN CONANT, WILLIAM L. AVERY, PEAVIS J. Avery, partners, under the firm-name and style of J. Edwin Conant & Co.

Assumpsit. Attachment in aid thereof.

49 Benson C. Hinkle, one of the plaintiffs in the above-entitled cause, being duly sworn according to law, deposes & says that the above-entitled action was commenced by summons, & is still pending and undetermined in said court.

Affiant further states that said suit was commenced by the plaintiffs to recover an indebtedness due them from the said J. Edwin Conant, William L. Avery, and Peavis J. Avery, partners as aforesaid, on account of money on an account stated, & for goods, wares, & merchandise sold & delivered from plaintiffs to defendants, due from the said defendants to the plaintiffs, and by the defendants promised to be paid to the plaintiffs in the sum of twenty-one hundred & seventy & $\frac{61}{100}$ dollars, which is now due and unpaid.

Affiant further says that the said J. Edwin Conant, William L. Avery, and Peavis J. Avery, are not residents of the State of Illinois. Affiant therefore on behalf of the said plaintiffs prays for an attachment in aid of said suit at law.

BENSON C. HINKLE.

Subscribed and sworn to before me this day of Dec., A. D. 1871.

50 Upon the back of which said affidavit is the following endorsement, to wit: "Affidavit for attachment in aid, &c. Filed Decr. 15th, 1871. H. C. Wortham, clerk."

And be it remembered that on the day and year last herein aforesaid, there was filed in the office of the clerk of the circuit court aforesaid, a bond in the words and figures following, to wit:

"Know all men by these presents that we, Benson C. Hinkle, Isaac V. Coddington, Stephen R. Coddington, & W. S. Hinkle, are held and firmly bound unto J. Edwin Conant, William L. Avery, & Peavis J. Avery in the penal sum of forty-five hundred ($4,500) dollars and cents, lawful money of the United States, for the payment of which said sum well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"Sealed with our seals, and dated this 15th day of December, 1871."

51 The condition of the above obligation is such that whereas there is now pending and undetermined in the circuit court in and for the county of Coles, in the State of Illinois, a certain action of assumpsit, wherein the said Benson C. Hinkle, Isaac V. Coddington, & Stephen R. Coddington are plaintiffs, and the said J. Edwin Conant, William L. Avery, & Peavis J. Avery are defendants; and whereas the above-bounden Benson C. Hinkle, Isaac V. Coddington, & Stephen R. Coddington have, on the day of the date thereof, prayed an attachment out of the said circuit court, at the suit of the said Benson C. Hinkle, Isaac V. Coddington, and Stephen R. Coddington against the estate of

Now, unless the said J. Edwin Conant, William L. Avery, and Peavis J. Avery shall personally be and appear before said court on the first day of the next term thereof, to be held at the court-house, in the city of Charleston, on the fifth Tuesday of the month of October, 1872, and give bail and plead in said cause, judgment will be entered and the property attached sold to satisfy the same.

H. C. WORTHAM, *Clerk.*

HORACE S. CLARK, *Atty. for Plffs., Aug.* 22.

Attached to said note is the certificate of the publishers, in the words and figures following, to wit:

"CHARLESTON, ILLS., *Nov.* 7, 1872.

"We, the undersigned publishers of the Plaindealer, a weekly
58 newspaper of general circulation, published at Charleston, Coles County, Illinois, hereby certify that the annexed notice was inserted in said paper on the 22d day of August, 1872, and continued therein for six consecutive weeks, ending on the 3d day of October, 1872.

"Printer's fees, $9.00, the receipt of which is hereby acknowledged.

"DUNBAR BROS.,
"*Publishers Plaindealer.*"

And be it remembered that afterwards, to wit, on the 13th day of November, A. D. 1872, there was filed in the office of the clerk of the circuit court various accounts and statements of indebtedness, in the words and figures following, to wit:

(Triplicate.)

Contractors of the Chicago & Illinois Southern Railroad, to Hinkle, Coddington & Co., Dr.

1871. To 459 ft. lumber, $2.35 ..... $10 67

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

59 "Received, 1871, of the contractors of the Chicago & Ill. Southern Railroad, by the hands of J. B. Ayer, genl. supt., ten $\frac{67}{100}$ dollars, in full & for the above account.

$ . ."

(Triplicate.)

Contractors of the Chicago & Illinois Southern Railroad to Hinkle, Coddington & Co., Dr.

1871.

June.	To 602 ft. 2 × 6 plank, @ $35.00	21 07
	" 100 " " " extra, 50.00	5 00
	" 78 " " " @ $20.00	1 56
D. S. M.	Materials for water-tank	$24 63

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

Approved:

Chief Engineer.

"Received, 187 , of the contractors of the Chicago & Ill. Southern Railroad, by the hands of , dollars, in full of the above account.

$ . ."

(Triplicate.)

Contractors of the Chicago & Illinois Southern Railroad to Hinkle & Coddington & Co., Dr.

1871.

June.	To 153 posts, @ 12½ c	$19 13
	" 3,000 ft. boards, @ $22.50	67 50
		$86 63

60 C. T. S. Materials for fence.

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

Approved:

Chief Engineer.

"Received, , 187 , of the contractors of the Chicago & Ill. Southern Railroad, by the hands of , dollars, in full for the above account.

$ . ."

c. (Triplicate.)

Contractors of the Chicago & Illinois Southern Railroad to Hinkle, Coddington & Co., Dr.

1871.

June.	To 10,080 ft. 1-in. bds., @ $22.50	226 85
	" 911 " 1½ " " @ "	20 52
	" 480 " flooring, $27.00	13 20
	" 448 " clear, 30.00	13 44
	" 304 " 2 × 4 joist, 25.50	6 84
	" 1,554 " 6 × 8 " 23.50	36 52
	" 25,000 " shingles, 3.00	75 00
	" 5 window-sash, 80	4 00
		$396 37

D. S. & M. Materials for engine-house.

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

61 Approved.

Chief Engineer.

"Received, , 187 , of the contractors of the Chicago & Ill. Southern Railroad, by the hands of , dollars, in full for the above account.

$ . ."

(Triplicate.)

c. c.

Contractors of the Chicago & Illinois Southern Railroad to Hinkle, Codington & Co., Dr.

1871.			
July 18th.	To 2,090 feet tank-lumber, oak, $2.25	49	11
" 21.	" 2-6-6-16, $2.35	2	25
	" 470 ft. 16-ft. bds & 190 ft. 14-ft. bds., 2¼	14	85
	" 17 4-4-12 & 3-2-4-14 = 299 ft., $2.35	7	03
" 26.	" 2-6-6-20 & 4-4-4-12 = 184 ft., $2.35	4	30
	" 24 ft. clear poplar		96
	" 624 ft., $2.35	14	66
Aug. 1.	" 250 battens, 17½	31	25
" 14.	" 309 feet boards, 2¼ c	6	95
" "	" 44 feet	1	00
" 18.	" 160 feet, 2 × 4, 2½	3	60
" "	" 272 " com. boards	6	12
Sept. 2.	" 432 " $2.35	10	15
" 8.	" 28 " sun clear		98
	10-4-6-16, 2-6 = 16.		
Oct. 10.	" 70 fence-boards & 900 ft. = 1,780 ft., $2.35	41	83
" 17.	" 80 ft. fen. pens at Sull., 2¼	1	80
" "	" For cattle-pens at Sullivan, 2,241 ft., $2.35	52	66
		$249	50

62 Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

Approved.

, *Chief Engineer.*

"Received, , 1871, of the contractors of the Chicago & Ill. Southern Railroad, by the hands of J. B. Ayre, genl. supt., two hundred forty-nine $\frac{50}{100}$ dollars in full for the above account.
$249 50. "

(Triplicate.)

Contractors of the Chicago & Illinois Southern Railroad to Hinkle, Codington & Co., Dr.

1871, Oct. 31. To rent of office from May 1st to Nov. 1st.....$72 00

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt.*

Approved.

, *Chief Engineer.*

"Received, , 1871, of the contractors of the Chicago & Ill. Southern Railroad seventy-two $\frac{00}{100}$ dollars in full for the above account.
$72.00. "

(Triplicate.)

63 Contractors of the Chicago & Illinois Southern Railroad to Hinkle, Codington & Co., Dr.

1871. Dec. To acceptance of C. C. Egleston's order.....1,157 26

Nine hundred dollars due C. C. Eggleston for depot-building at Mattoon, and two hundred and fifty-seven $\frac{26}{100}$ dollars to apply on contract for depot-building at Sullivan, Ills.

Examined and found correct.

A. C. WARE, *Clerk.*

Examined and found correct.

J. B. AYRE, *Genl. Supt*

Approved.

Chief Engineer.

"Received, , 187 , of the contractors of the Chicago & Ill. Southern Railroad, by the hands of , eleven hundred & fifty-seven $\frac{26}{100}$ dollars, in full for the above account.
$1,157.26.

."

J. E. Conant & Co., contractors of the C. & I. R. R. to Hinkle, Codington & Co.

1871. Dec. 14. To 200 posts for Saunders' fence, 15.....$30 00
" 3,000 feet oak fencing, 2.35..... 70 50

100 50

(Written across the face:)
Accepted Decr. 14th, 1871.

J. B. AYRE,
Genl. Supt., for J. Edwin Conant & Co.

64 Mess. J. Edwin Conant & Co., pay to the order of B. C. Hinkle for account of N. B. Reaugh, fifty-four $\frac{70}{100}$.

W. S. HINKLE.

Dec. 14th, 1871.

And be it remembered that heretofore, to wit, on the twelfth day of April, in the year of our Lord one thousand eight hundred and seventy-two, it being the fourth judicial day of the term, there appears of record on the records of said court this other and further order, to wit:

BENSON C. HINKLE ET AL. *vs.* J. EDWIN CONANT ET AL. } In assumpsit. Attachment in aid.

On motion of the plaintiffs' attorneys, it is ordered by the court that this cause stand continued, &c.

And be it also remembered that afterwards, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred and seventy-two, there was issued out of the office of the clerk of the circuit court aforesaid a writ of fieri facias or execution in the words
65 and figures following, to wit:

STATE OF ILLINOIS, *Coles County, ss:*

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that of the following-described goods and chattles of J. Edwin Conant, William L. Avery, and Peavis J. Avery, to wit, one locomotive-engine, No. 2, known as the Horace Hayward, heretofore, to wit, on the 16th day of Dec., 1871, levied upon in this cause by attachment, &c., in your county, you cause to be made the sum of twenty-two hundred & eighty-five dollars and fifty-three cents, with interest thereon from the seventh day of November, A. D. 1872, until paid, which Benson C. Hinkle, Isaac V. Coddington, and Stephen R. Coddington, lately in our circuit court for the said county of Coles recovered against them for damages, in action of assumpsit, with attachment in aid; also twenty ($20) dollars and thirty (30) cents, which was awarded by our said court to the said Benson C. Hinkle, Isaac V. Coddington, and Stephen
66 R. Coddington for costs and charges in that behalf expended, whereof the said J. Edwin Conant, William L. Avery, and Peavis J. Avery are convicted, as appears to us of record; and have you the money at the clerk's office of said court at Charleston, in ninety days from date hereof, to render unto the said plaintiffs their damages, interest, and cost as aforesaid; and have you then and there this writ.

Witness W. N. McDonald, clerk of said court, and the judicial seal thereof, at Charleston, this 12th day of December, A. D. 1873.

[SEAL.] W. N. McDONALD, *Clerk*,
By W. J. GREGG, *Deputy*.

Upon the back of which said execution are the following endorsements, to wit:

"Came to hand Decr. 12th, 1872, at 10 o'clock, a. m.
"OWEN WILEY, *S. C. C.*,
"By V. K. CURD, *Dpty.*"

"DEC. 14th, 1872.—By virtue of the within writ of execution, I have this day levied upon the within-described property, to wit, one locomotive-engine, known as the Horace Hayward, as I am herein commanded.
"OWEN WILEY, *S. C. C.*,
"By V. K. CURD, *Dpty.*"

67 "JANY. 11th, 1873.—This execution is returned with a credit of one thousand dollars by sale to J. O. Rudy of the above-described property, the same having been duly advertised according to law, and no other property found out of which to make the balance.
"OWEN WILEY, *S. C. C.*,
"By V. K. CURD, *Depty.*"

Fees:

Levy	65
12 miles	1 20
Commission	18 00
Advertising	75
Return	10
	20 70
Guarding	127 50
	$158 20

I, E. E. Clark, clerk of the circuit court of Coles County in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the papers, records, and proceedings in a certain cause heretofore pending in said court, on the common-law side thereof, wherein Benson C. Hinckle, Isaac V. Coddington, & Stephen R. Coddington were plaintiffs, and J. Edwin Conant, William L. Avery, & Peavis J. Avery were defendants.

In witness whereof I have hereunto set my hand and affixed the
68 seal of said court at Charleston this seventh day of November, A. D. 1873.

{ CIRCUIT COURT COLES COUNTY, ILLINOIS. }

E. E. CLARK, *Clerk*,
By WM. R. HIGHLAND, *Dpty.*

STATE OF ILLINOIS, *County of Cole, ss:*

I, Oliver L. Davis, presiding judge of the fifteenth judicial circuit of the State of Illinois, and as such sole presiding judge of the circuit court of Coles County, State aforesaid, which said county of Coles was formally in the 27th judicial circuit of said State, do hereby certify that the said E. E. Clark, whose name is subscribed to the foregoing certificate, now is, and was at the date of said certificate, clerk of said circuit court of Coles County, that his signature thereto is genuine, and that his foregoing attestation is in due form of law.

Given under my hand this 24th day of December, A. D. 1873.

O. L. DAVIS,
Judge Circuit Court Coles Co., Ills.

(Endorsed:) Filed June 15, 1874. J. A. Jones, clerk. And also copies of accounts rendered to the D. S. & M. R. R. by the Rhode Island
69 Locomotive W'ks and letter transmitting said accounts, (papers marked "E & F.")

Special finding of the court.

And thereupon the court found the following special verdict for the plaintiff:

1. That the lease offered in evidence by pltfs. was a subsisting executory contract between the parties thereto. That the plaintiffs had not parted with the legal possession of the locomotive in controvercy.

2. That the plaintiffs had never received payment for the locomotive in controvercy, other or further than as stated in the face of their lease.

3. That plaintiffs delivered to J. Edwin Conant & Co. the said locomotive to be used by them in the State of Illinois, and that said locomotive was so used in the State of Illinois exclusively.

5. That the possession of J. Edwin Conant & Co. was the possession of the plaintiffs.

5. That the defendant obtained possession of the locomotive in controvercy in due form of law under execution, levy, & sale in pursuance of a valid judgment obtained in a court of competent jurisdiction, after due service upon the parties thereto, in the suit entitled "Hinkle, Coddington & Co. vs. J. Edwin Conant & Co."

70 6. That sale under said execution was made by an officer duly authorized thereto to one J. O. Rudy, the payment in full of the amount bid at said sale was made by said purchaser to said officer, and that said officer delivered the said locomotive to said Rudy.

7. That afterwards the said execution purchaser sold & delivered the said locomotive-engine to the deft. for the sum of $3,500, which was paid.

8. That subsequent to such sale and delivery to defts., plaintiffs placed upon record in the proper recorder's office in the county of Coles, in the State of Illinois, where the said property was held, the said lease in the chattel-mortgage records of said county.

9. That such sale to defendants and such recording were more than one year subsequent to the original proceeding by attachment in the case before mentioned.

10. That said attachment proceedings were of record, and during all the time aforesaid plaintiffs took no step leading towards the recovery of said locomotive-engine.

Therefore the court found for the plaintiff, and gave judgment accordingly.

71 To which special finding of the court, and to each and every part thereof, and to the rendition of judgment thereon, the defendant then and there excepted.

Defendant entered motion for a new trial, which was by the court overruled; to which action of the court in refusing a new trial, defendant then and there excepted; and

Whereas the matter and things herein do not appear of record, the defendant ask that this their bill of exceptions be signed and sealed and made a part of their record, which is done.

(Note by the judge.—This case, with another of the same plaintiff vs. Robt. G. Harvey & the Paris & Decatur R. R. Co., were heard together & the evidence partly the same in both cases.)

THOMAS DRUMMOND.

(Endorsed:) Filed June 15, A. D. 1874. J. A. Jones, clk.

Afterwards, to wit, on the eighth day of August, of the year last aforesaid, came again said defendant and filed its bond herein, which said bond is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

72 RHODE ISLAND LOCOMOTIVE WORKS *vs.* INDIANAPOLIS, BLOOMINGTON & WESTERN Railway Company. } Replevin.

Know all men by these presents that we, the Indianapolis, Bloomington and Western Railway Company and Henry Conkling, are held and firmly bound unto the Rhode Island Locomotive Works in the sum of twenty-five thousand dollars to be paid to the said Rhode Island Locomotive Works, their successors and assigns, to which payment well & truly to be made we bind ourselves & each of us, jointly & severally, & our & each of our heirs, executors, & assigns, jointly by these presents.

Sealed with our seals. Dated this 5th day of August, A. D. 1874.

Whereas the above-named Indianapolis, Bloomington & Western Railway Company hath taken an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Illinois:

73 Now, therefore, the condition of the above obligation is such that if the above-named Indianapolis, Bloomington & Western Railway Company shall prosecute their said appeal to effect, & answer all costs & damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force & virtue.

For the Indianapolis, Bloomington & Western Railway Company,
By C. W. SMITH, *General Manager.* [SEAL.]
HENRY CONKLING. [SEAL.]

Attest:
[SEAL.] A. P. LENIO, *Secretary.*

Approved:
S. H. TREAT, *Dist. Judge.*

(Endorsed:) Filed August 8, A. D. 1874. J. A. Jones, clerk.

And afterwards, to wit, on said eighth day of August, of the year last aforesaid, a writ of error issued in said cause in the words and figures following, to wit:

74 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the Rhode Island Locomotive Works, plaintiff, and the Indianapolis, Bloomington and Western Railway Company, defendant, a manifest error hath happened, to the great damage of the said Indianapolis, Bloomington and Western Railway Company, as by its complaint appears, we being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things con-
75 cerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison P. Waite, Chief-Justice of the said Supreme Court, the eighth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.]
J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

Filed August 8th, 1874.

J. A. JONES, *Clerk.*

76 UNITED STATES OF AMERICA, *ss:*

To the Rhode Island Locomotive Works, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein the Indianapolis, Bloomington and Western Railway Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this eighth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

S. H. TREAT.

Service of the within citation is hereby acknowledged this 9th day of October, 1874.

HAY, GREENE & LETTLER,
Attys. for Deft. in Error.

(Indorsed:) Rhode Island Locomotive Works v. Indianapolis, Bloomington and Western Railway Co. Citation.

77 CIRCUIT COURT OF THE UNITED STATES,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a true and complete copy of all the papers filed, proceedings thereon had, and process issued in a certain cause wherein the Rhode Island Locomotive Works is plaintiff and the Indianapolis, Bloomington and Western Railway Company is defendant, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] J. A. JONES, *Clerk.*

78 Supreme Court of the United States.

THE INDIANAPOLIS, BLOOMINGTON AND WESTERN Railway Company
vs.
THE RHODE ISLAND LOCOMOTIVE WORKS. } In error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Indianapolis, Bloomington and Western Railway Company, by Robert G. Ingersoll and J. C. Black, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the declaration

aforesaid and the matters therein contained are not sufficient in law for the said Rhode Island Locomotive Works to have or maintain its aforesaid action thereof against the said Indianapolis, Bloomington and Western Railway Company; there is also error in this, to wit,
79 that by the record aforesaid it appears that the judgment aforesaid given was given for the said Rhode Island Locomotive Works against the said Indianapolis, Bloomington and Western Railway Company; whereas by the law of the land the said judgment ought to have been given for the said Indianapolis, Bloomington and Western Railway Company against the said Rhode Island Locomotive Works; and the said Indianapolis, Bloomington and Western Railway Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, etc.

ROBERT G. INGERSOLL AND J. C. BLACK,
Attorneys for Plaintiff in Error.

(Indorsement on cover:) No. 158. The Indianapolis, Bloomington & Western Railway Company, plaintiff in error, vs. The Rhode Island Locomotive Works. S. Illinois C. C. U. S. Filed 15th October, 1874.

Supreme Court of the United States.

DECEMBER TERM A. D. 1876.

No. 158.

THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE RHODE ISLAND LOCOMOTIVE WORKS.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

ROBERT G. INGERSOLL,
Counsel for the Plaintiff in Error.

Transcript Company, Printers, Peoria, Ill.

Supreme Court of the United States.

DECEMBER TERM A. D. 1876.

No. 158.

THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE RHODE ISLAND LOCOMOTIVE WORKS.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In this case the Rhode Island Locomotive Works on the 13th day of September, 1871, entered into a contract with J. Edwin Conant & Co., contractors, to

build the Chicago & Illinois Southern Railroad, which contract is set out on pages 7, 8, 9, 10 and 11 of the record. Under this contract certain locomotives were delivered to J. Edwin Conant & Co., and were by them removed to the State of Illinois; it being known at the time the contract was made by the Rhode Island Locomotive Works, that the locomotives were to be taken to the State of Illinois, and used in the construction of the railroad in that State. J. Edwin Conant & Co. took possession of the locomotive Horace Hayward No. 2 and tender, took the same to Illinois, and commenced the construction of the said railroad. Edwin Conant & Co. became embarrassed, contracted debts along the line of the road and failed to pay them. Conant & Co. claimed to be the owners of the Horace Hayward No. 2, and two other engines, and parties contracted with them on the faith of their statement, taken in connection with the fact that they had the engines in possession. Afterwards, in October, 1872, suit was commenced by Benson C. Hinkle, Isaac V. Coddington and Stephen R. Coddington, against J. Edwin Conant, *et al.*, as appears by the record, page 16, and the plaintiffs recovered a judgment against the defendants in the sum of $2,285.53, together with their costs, and a special execution was issued for the sale of the property levied upon by virtue of the attachment, to-wit: The engine and tender known as the Horace Hayward No. 2; and afterwards, on the 11th day of January, 1873, the execution was returned with the credit of $1,000, by a sale to J. O. Rudy of the above described property,

viz: the locomotive engine and tender Horace Hayward No. 2, as will be seen on the 26th page of the record. That, afterwards, C. W. Smith, acting for and on behalf of the Indianapolis, Bloomington & Western Railway Co., bought the engine Horace Hayward No. 2, of the said J. O. Rudy, for $3,500, and that the said Rudy then had the engine in his possession; that the said C. W. Smith knew of no claim in the Rhode Island Locomotive Works, or any other party, to said engine, but understood that the said engine had been bought at the sheriff's sale as the property of J. Edwin Conant & Co. Upon this state of facts the following special verdict was found for the plaintiff below:

1st. That the lease offered in evidence by the plaintiff below, was a subsisting executory contract between the parties thereto, that the plaintiff had not parted with the legal possession of the locomotive in controversy.

2d. That the plaintiff below had never received payment for the locomotive in controversy, other or further than as stated in the face of their lease.

3d. That the plaintiff below delivered to J. Edwin Conant & Co. the said locomotive, to be used by them in the State of Illinois, and that the said locomotive was so used in the State of Illinois exclusively.

4th. That the possession of J. Edwin Conant & Co. was the possession of the plaintiff below.

5th. That the defendant obtained possession of

the locomotive in controversy in due form of law, under execution, levy and sale in pursuance of a valid judgment obtained in a court of competent jurisdiction, after due service upon the parties thereto, in a suit entitled Hinkle, Coddington & Co. *vs.* J. Edwin Conant & Co.

6th. That the sale under said execution was made by an officer duly authorized thereto, to one J. O. Rudy, payment was made to the officer, and said officer delivered the said locomotive to the said Rudy.

7th. That afterwards, the said execution purchaser sold and delivered said locomotive engine to the plaintiff in error, for the sum of $3,500, which was paid.

8th. That subsequent to such sale and delivery, the plaintiff below placed upon record in the proper recorder's office, in the County of Coles, in the State of Illinois, where the property was held, the said lease in the chattel mortgage records of said county.

9th. That such sale to the Indianapolis, Bloomington & Western Railway Co., and such recording were more than one year subsequent to the original proceedings by attachment in the case before mentioned.

10th. That the said attachment proceedings are of record, and that during all the time aforesaid, the Rhode Island Locomotive Company took no step leading towards the recovery of the said locomotive engine. And thereupon, the court found for the plaintiff below, and gave judgment accordingly.

I.

It is impossible for us to tell whether the contract in this case was a chattel mortgage, a conditional sale, an absolute sale, or precisely what. The contract recites that the party of the first part is the owner of the engine, that the party of the second part is desirous to use it, and eventually of purchasing it; and that therefore, in consideration of one dollar paid to the party of the first part, by the party of the second part, and in consideration of the covenants and agreements thereinafter contained. the party of the first part agrees to let and lease, and does let and lease to the party of the second part, the said locomotive engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner; and in consideration thereof the party of the second part covenants and agrees to pay to the party of the first part, for use and rent, the sum of $12,093.96, as follows :

1st. Ten per cent. in cash, amounting to $1,150, one note due March 16th, 1872, for $3,580.16; one note due June 16th, 1872, for $3,647.90, and one note due September 16th, 1872, for $3,715.90. In other words, according to this agreement, the party of the second party agrees to pay $12,093.96 rent, for the use of an engine one year. Evidently this was not the intention of the parties. In addition to this, the party of the second part was to keep the engine in good order; and the party of the first part further agreed that if the party of the second part paid all the notes

promptly and all renewals of the same, then it would sell, and transfer and convey to the party of the second part, the locomotive engine and tender in the condition it then might be. And it was further agreed that if the party of the second part failed to make the payments, then the party of the first part should be at liberty to enter upon and take possession of the locomotive; and the party of the second part further agreed, if any default was made, that they would within thirty days thereafter, deliver the locomotive engine to the party of the first part; and then it was the duty of the party of the first part to sell it, and have the proceeds of the sale pay what might be due upon the notes, and the expenses of the sale; and, if any balance was left, deliver the same to the party of the second part.

Under this contract Conant & Co. took possession of the engine, took it to the State of Illinois, got credit upon the fact that they had it in their possession, failed to pay their debts, suit was brought, the engine was attached, the engine was sold. More than a year elapsed from the commencement of the suit to the sale of the engine—Conant, in the meantime, having left the country—and after the lapse of a year this engine was purchased in good faith by the plaintiff in error for the sum of $3,500, and after such purchase, and after the engine was in the possession of the plaintiff in error, then the defendant in error had this contract put upon record, the same having been recorded on the 17th day of January, 1873.

What we claim is that the property really be-

longed to J. Edwin Conant & Co.; that if it did not belong to J. Edwin Conant & Co., and the Rhode Island Locomotive Works had the right to take possession of the engine, it was a right they should have exercised within a reasonable time, and, failing to do that, they are estopped.

All the *indicia* of ownership were in J. Edwin Conant & Co., and afterward in J. O. Rudy. The attachment proceedings were all regular, and the sale upon its face was regular and valid.

II.

We insist that the contract in question is subject to the laws of the State of Illinois.

In the case of *Cyrus H. McCormick, et. al., vs. George M. Hadden*, 37 Ill., 370, it is held that where the vendor of personal property delivers possession to the purchaser under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession, such agreement as to the creditors of the purchaser is fraudulent and void. See also

Joel B. Ketchem vs. Michael Watson, 24 Ill., 591.
Thompson vs. Yeck, 21 Ill., 73.
Murch vs. Wright, 46 Ill., 487.

In the case last mentioned "L" took from "M" a piano at the price of $700; "L" paid fifty dollars down, which was called rent for the first month, and was to pay fifty dollars each month as rent until

the $700 was paid, when "L" was to own the piano. This was held to be a conditional sale, with a right of rescision on the part of "M," in the event of "L's" failure to perform, but that the piano, notwithstanding the sale was conditional, was subject to a levy by the creditors of "L."

This case is precisely like the case at bar. The question is whether a secret lien of this kind, in fraud of the chattel mortgage laws of the State of Illinois, can be maintained. The Supreme Court of Illinois has decided again and again that such a lien is a fraud as to third persons, and can be maintained only in one way, viz: By complying with requirements of the chattel mortgage act.

In this case it is not only an inference of law, but it is a fact substantiated by the evidence, that the credit was given to J. Edwin Conant & Co. on account of the engines which they had in their possession, and which they claimed to own, and over which they exercised all acts of ownership. The lien of the Rhode Island Locomotive Works, if any existed, was a secret lien, good, of course, as between the parties, but not as to third persons. Had the Rhode Island Locomotive Works wished to have made their lien good in the State of Illinois, they should have recorded their agreement under the chattel mortgage act of this State.

All of which is respectfully submitted,

ROBERT G. INGERSOLL,

Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1876.

INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO.,
Plaintiff in Error,
vs.
RHODE ISLAND LOCOMOTIVE WORKS,
Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HAY, GREENE & LITTLER,

Of Counsel for Defendant in Error.

SPRINGFIELD:
Frank Hudson, Jr., Printer, 221 S. 5th Street.
1876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1876.

INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO., *Plaintiff in Error,* *vs.* RHODE ISLAND LOCOMOTIVE WORKS, *Defendant in Error.*	*Error to the Circuit Court of the United States for the Southern District of Illinois.*

BRIEF AND ARGUMENT OF HAY, GREENE & LITTLER,

FOR DEFENDANT IN ERROR.

MAY IT PLEASE THE COURT:

As the plaintiff in error has not yet filed a brief or argument, we are compelled to prepare one on our side in order to comply with the rules of the court, and to anticipate as best we may what the opposing counsel may say.

The important facts are few in number.

On the 11th day of May, 1871, J. Edwin Conant, William L. Avery, and Pearis J. Avery, were partners engaged as contractors in constructing the Decatur, Sullivan & Mattoon R. R., in the State of Illinois, said firm doing bussiness as J. Edwin Conant & Co.

On said day the defendant in error, a corporation existing under the laws of the state of Rhode Island, delivered to Conant & Co. a certain locomotive engine known as Horace Hayward No. 2, being the only property in controversy in this suit.

Said engine was so delivered under a contract bearing date May 11, 1871, which contract was signed in Rhode Island by defendant in error, and in New York by Conant & Co.

Conant & Co. paid the sum of $1,150 down, the entire price agreed upon being $12,093.66, including the cash payment. Notes were given for the balance maturing at different times, but nothing was ever paid except the $1,150.

Conant & Co. failed in a short time; the directors seized the road and part of the rolling stock, not including this engine, and with the consent of Conant & Co. turned the property over to a Mr. Ingersoll, for the purpose of operating the same and making a debt of $100,000, due the Cleveland Iron Company.

(Printed record p. 14.)

On the 15th day of Dec., 1871, Henkle, Addington & Co. sued out of the Circuit Court of Coles County, Illinois, a writ of attachment against Conant & Co., to make an alleged debt of $2,170.61.

(Printed record p. 19.)

This attachment was levied on the said engine as the property of Conant & Co., on the 16th day of December, 1871.

There is no statement in the record as to when a judgment was rendered in said attachment suit, nor copy of a judgment given. But we suppose this was a mere omission, for on the 12th day of Dec., 1872, a special execution issued which reads that a judgment had been rendered.

(Printed record p. 26.)

At the April term of said Court said cause was continued, so the judgment must have been rendered at the December term, just before the special execution issued.

Under this special execution the engine attached was sold, and return of said sale made on the 11th day of January, less than a month after the date of the execution.

(Printed record p. 26.)

J. O. Rudy bought at the Sheriff's sale for $1,000, and on the same day sold the property to C. W. Smith, manager of the R. R. of plaintiff in error, for $3,500.

(Printed record p. 13.)

Defendant in error replevied said engine on the 10th day of Feb. 1873. The Circuit Court, trying the cause without a jury by consent, found a number of special facts, and found the property in the defendant in error, giving judgment accordingly. To reverse that judgment this writ of error is prosecuted.

The plaintiff in error (defendant below) files four pleas:

1st. That it did not detain the property, or non cepet.

2nd. That the engine was the property of defendant below.

3rd. That the engine was the property of the Chicago & Illinois Southern Railroad Company.

It was admitted on the trial below that no part of the purchase money of the engine, except the sum acknowledged on the contract, viz., $1,150, had ever been paid, and that the defendant below was a corporation existing under the laws of Rhode Island and doing business there.

The above facts are all that we regard as of importance except the terms of the contract itself. That instrument is set out in full on pages 11, 12 and 13 of the printed record.

[Contract between Plaintiff and Conant.]

This agreement, made this eleventh day of May, eighteen hundred and seventy one, by and between the Rhode Island Locomotive Works of Providence, R. I., party of the first part, and J. Edwin Conant & Company, contractors for the Chicago & Illinois Southern Railroad Company, party of the second part, witnesseth: That whereas, the said party of the first part is the owner of one Locomotive engine and tender complete named Horace Hayward No. 2, and whereas the said

On said day the defendant in error, a corporation existing under the laws of the state of Rhode Island, delivered to Conant & Co. a certain locomotive engine known as Horace Hayward No. 2, being the only property in controversy in this suit.

Said engine was so delivered under a contract bearing date May 11, 1871, which contract was signed in Rhode Island by defendant in error, and in New York by Conant & Co.

Conant & Co. paid the sum of $1,150 down, the entire price agreed upon being $12,093.66, including the cash payment. Notes were given for the balance maturing at different times, but nothing was ever paid except the $1,150.

Conant & Co. failed in a short time; the directors seized the road and part of the rolling stock, not including this engine, and with the consent of Conant & Co. turned the property over to a Mr. Ingersoll, for the purpose of operating the same and making a debt of $100,000, due the Cleveland Iron Company.

(Printed record p. 14.)

On the 15th day of Dec., 1871, Henkle, Addington & Co. sued out of the Circuit Court of Coles County, Illinois, a writ of attachment against Conant & Co., to make an alleged debt of $2,170.61.

(Printed record p. 19.)

This attachment was levied on the said engine as the property of Conant & Co., on the 16th day of December, 1871.

There is no statement in the record as to when a judgment was rendered in said attachment suit, nor copy of a judgment given. But we suppose this was a mere omission, for on the 12th day of Dec., 1872, a special execution issued which reads that a judgment had been rendered.

(Printed record p. 26.)

At the April term of said Court said cause was continued, so the judgment must have been rendered at the December term, just before the special execution issued.

Under this special execution the engine attached was sold, and return of said sale made on the 11th day of January, less than a month after the date of the execution.

(Printed record p. 26.)

J. O. Rudy bought at the Sheriff's sale for $1,000, and on the same day sold the property to C. W. Smith, manager of the R. R. of plaintiff in error, for $3,500.

(Printed record p. 13.)

Defendant in error replevied said engine on the 10th day of Feb. 1873. The Circuit Court, trying the cause without a jury by consent, found a number of special facts, and found the property in the defendant in error, giving judgment accordingly. To reverse that judgment this writ of error is prosecuted.

The plaintiff in error (defendant below) files four pleas:

1st. That it did not detain the property, or non cepet.

2nd. That the engine was the property of defendant below.

3rd. That the engine was the property of the Chicago & Illinois Southern Railroad Company.

It was admitted on the trial below that no part of the purchase money of the engine, except the sum acknowledged on the contract, viz., $1,150, had ever been paid, and that the defendant below was a corporation existing under the laws of Rhode Island and doing business there.

The above facts are all that we regard as of importance except the terms of the contract itself. That instrument is set out in full on pages 11, 12 and 13 of the printed record.

[Contract between Plaintiff and Conant.]

This agreement, made this eleventh day of May, eighteen hundred and seventy one, by and between the Rhode Island Locomotive Works of Providence, R. I., party of the first part, and J. Edwin Conant & Company, contractors for the Chicago & Illinois Southern Railroad Company, party of the second part, witnesseth: That whereas, the said party of the first part is the owner of one Locomotive engine and tender complete named Horace Hayward No. 2, and whereas the said

party of the second part is desirous of using and eventually purchasing the same. Now therefore, in consideration of the sum of one dollar to the said party of the first by the said party of the second part in hand paid the receipt whereof is hereby acknowledged and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease and hereby does let and lease to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part the said one locomotive engine and tender with the right to place the same upon its railroad and to use the same in the usual manner in transacting the business of the said railroad, and in consideration thereof the said party of the second part hereby covenants and agrees to pay to the said party of the first part for the use and rent of the same the sum of twelve thousand ninty three dollars and ninety-six cents, as follows:

Ten per cent. cash,		$1,150.00.
One note due	Nov. 13th, 1871	3,580.16.
" " "	Feb. 13th, 1872	3,647.90.
" " "	May 13th, 1872	3,715.90.
		$12,093.96.

And the said party of the second part hereby further covenants and agrees during the time hereby demised to keep and mantain the said one locomotive engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted, but it is understood and agreed that any injury by collision, by running off the track, or by fire, or destruction from any cause is not to be considered reasonable and ordinary wear and tear. And the said party of the first part in consideration of the foregoing further covenants and agrees that in case the said party of the second part shall pay the said notes promptly as hereinbefore set forth, upon the payment of the last mentioned note, viz., thirty-seven hundred fifteen dollars and ninety six cents, and all renewals of same, it will grant, sell, assign, transfer and convey to the said party of the second part the said one locomotive engine and tender in the condition it then is; to have and to hold the same to the said party of the second part its legal representatives, successors and assigns forever.

And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payments when due, then the said party of the first part shall be at liberty and it shall be lawful for it to enter upon and take possession of the said one locomotive engine and tender and to that end to enter upon the road and other property of the said party af the second part. And the said party of the second part further covenants and agrees that in case of any defaults on its part in any of the payments as hereinbefore provtded, it will within thirty days thereafter deliver the said locnmotive engine and tender to the said party of the first part, and the said party of the first part shall thereafter, upon thirty days written notice to the said party of the second part of the time and place of sale, proceed to sell the said locomotive engine and tender and shall apply the proceeds of such sale, first to the payment of the expenses of the sale; second to the payment of any balance then due or hereafter to become due for or on account of the

rent as hereinbefore provided. And if after these payments there shall remain any balance of the proceeds of the sale the same shall be paid to the said party of the second part. And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber or in any way dispose of said one locomotive engine and tender or employ them during the term of this lease in any other way than in the service of J. Edwin Cenant & Co., contractors for the Chicago & Illinois Southern Railroad Co., or in any way or manner interfere with the said party of the first part in repossessing and retaiking said one locomotive engine and tender should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said one locomotive engine and tender shall and does remain in the Rhods Island Locomotive Works as fully to all intents and purposes as though the lease had not been made.

And the said party of the first part hereby covenants and agrees that if the said party of the second shall and do well and truly make each of the payments aforesaid at the time hereinbefore specified, without any let or hindrance or delay whatever as to any or either of said payments, that upon the last mentioned payment, viz.; thirty-seven hundren fifteen dollars and ninety-six cents, and all renewals being made as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive engine and tender to the said party of the second part and give them a full acquittance for the same, and that the title thereto shall ipse facto by the completion of such payment rest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company.

In witness whereof the parties hereto have hereunto set the corporate seal by the respective officers duly authorized.

[Signed.]

Rhode Island Locomotive Works,
Edw. P. Mason, Treasurer.

[Signed.]

J. Edwin Conant & Co.,
Contractors.

Corporate Seal of Company.

We consider as wholly immaterial, whether the foregoing instrument be regarded as a lease or as a contract of sale. We believe it partakes of the character of both. For some purposes it is a lease, and for others a conditional contract of sale.

So far we have seen no assignment of errors by plaintiff in error, and therefore suppose the only matter of complaint will be the action of the Court below in holding the above agreement valid as between the present parties. This is the only issue.

It was contended, and will be contended on behalf of plaintiff in error, that the above agreement—whatever its effect might be as between

the original parties to it—did not prevent the title to the engine from vesting in Conant & Co., and thereby becoming subject to the debts of the latter. It is true the contract provides that "the full legal right and "title of said one locomotive engine and tender shall and does remain "in the Rhode Island Locomotive Works, as fully, to all intents and "purposes as though the lease had not been made."

It will be insisted that notwithstanding this provision, the title to the property did vest on delivery in Conant & Co., and that any attempt to prevent such a result, by reservation in the agreement, is, as to these parties, constructively fraudulent and void.

A number of decisions by the Supreme Court of Illinois will be cited to establish the proposition; and we may admit that such has at last been declared as the law in this state. But we contend that cases in which such doctrine is announced are not well considered—that they are not at all sustained by the prior decisions of the same Court cited in support of them—that they are at variance with almost the whole current of authority in this country, state and federal—and that they are not binding on this Court. Indeed, the ruling of the Supreme Court on this question affords a singular instance of the manner in which an unreasonable rule is sometimes adopted because of the assumed force of authority, when in fact such authority, when closely examined, does not at all justify the conclusion.

Before considering the Illinois cases, we shall present our view of the legal question, and then inquire how far it is justified by the authorities.

The question is one of common, or rather of commercial law. It is often a matter of great difficulty to determine under what circumstances the title to personal property passes from one person to another. The consequences of such transfer are often of the utmost importance to the parties, and to others as creditors of or purchasers from some of the parties. The facts which constitute or create a change of title often border so closely on those which do not produce such result, that it is

difficult to mark the dividing line. Yet the law must in every instance prescribe some rule, and the courts are frequently compelled to resort to very slight circumstances in order to determine such controversies.

But the law has adopted one principle, which seldom fails as a true guide in ascertaining when that intangible thing called title passes from one person to another.

It desires that every man should be what he appears to be, and own what he appears to own. Accordingly, it is settled, ever since Troynne's case, that the owner of personal property shall not sell or pledge it secretly yet retain possession of it, to the injury of those who, knowing of the original ownership, do not know of the secret transfer.

If A give credit to B on the faith of property which the latter owned and still retains, C shall not be heard to say, "I secretly bought that property," and may therefore take from B after he has levied upon it to make his debt. To this extent the law interferes, and declares that if the owner of personal property desires to sell or create a lien upon it and yet retain possession, he must, at least as against third parties, either part with the possession or resort to some statutory mode by which notice may be given to the world.

On the other hand, the law does not, nor ever did, forbid one man from possessing and using the personal property of another, without subjecting that property to the liabilities of the person so possessing it.

While the law decrees that each man shall own what he appears to own, and while the possession of personal property raises a presumption of ownership, yet this is only a presumption. The law gives no absolute assurance to any creditor or purchaser who relies on such presumption.

Not only may the owner of goods hire them for use to another, and thereby invest the latter with all the outward *indicia* of ownership, but he may follow the goods and retake them from a purchaser, however innocent, who has purchased relying on the apparent title of the party in possession.

The privilege allowed by the law is no doubt often abused, but on the whole it is beneficial. It will not do, for fear of frauds, to forbid all bailments, all sales by agents and factors, and all neighborly accommodation.

We may say that a secret sale of goods without a change of possession—which, as to third parties, the law forbids—and a simple bailment for hire—which the law permits as against all the world—present instances of two extremes. Between those extremes lie numerous cases which the law must classify on one side or the other, assigning each to its proper place among those which are permitted or those which are forbidden. The rule applied by the law is, that in the absence of fraud the intention of the parties shall govern. Where the vendor *intends* to part with the title and to rely on the promise of the vendee for payment, or upon the ordinary process of law to compel payment, and with such intent possession is delivered, the title passes, with all the consequences of such change. The vendor has thereafter, in law, no higher claim to the property than any other creditor of the vendee. This may be a hardship in many cases, but can not be avoided. The law can not recognize or apportion the secret liens to the extent of the unpaid purchase money of all the chattel property of debtors, where the vendors have sold and delivered the same to the debtor with intent that he might own, control, and dispose of it as he pleased.

But when, in the absence of fraud, the parties expressly stipulate that the title to the property shall not pass till the purchase money be paid, then the title does not pass till the purchase money is paid. The law applies its rule of judging by intentions fairly expressed. In such case the world can not be deceived, as it might be by the secret sale of property which the vendor once owned and still retains. There is not a single reason for holding such a conditional sale actually or constructively fraudulent, that can not be applied with equal force to the loaning of chattels by one man to another. If it be a fraud, so is the act of a farmer who lends a horse to a poorer neighbor to cultivate his crop.

Nothing can be said in either case against the transaction, except that one man has the possession of chattels owned by another, and it is *possible* that some person may thereby be deceived. As a matter of fact, we think very few are ever deceived in that way; at all events, the law does not forbid such possession, nor give assurance that any third person may rely upon it.

We suppose it will be admitted that one man may lend or hire chattels to another without subjecting them to the debts of the latter. And if so, can any one imagine a single reason why such a transaction is to be held fraudulent, because, superadded to the contract of loan or hire, there is a further stipulation that the bailee may purchase on specified terms and within a given time?

A lease gives possession, and it is lawful and good as against everybody. Such possession is the only circumstance by which any one may be deceived, but that circumstance is in no degree changed by the superadded right of purchase. We submit that there is not one shadow of reason for holding the lease or bailment good and the conditional sale void. There is not a single circumstance from which fraud can be inferred—fraud in one that is not fraud in the other. The law does not declare any human action fraudulent without reason, and there is absolutely no reason for the conclusion which the Supreme Court of this state has reached on this question.

The case does not at all resemble one in which the owner of property seeks to sell or encumber the same, and yet retain possession. As to such transactions, there are statutory provisions in all the states, and these must be observed. Chattel-mortgage acts, and acts regulating bills of sale, were made for just such cases. But the contract now being considered had nothing to do with such provisions. There was nothing in the nature of a mortgage made or required. Such an instrument would have been wholly inconsistent with the state of the title. Plaintiff in error could not make a mortgage or bill of sale, for it did not own and never had owned the engine. Defendant in error could not accept

such instrument, for to have done so would have been to recognize title in the bailee. It was wholly immaterial when the contract was recorded, for there was no law requiring it to be recorded at all, or making it notice if recorded.

It was urged on behalf of plaintiff in error, that because the contract provided that in default of payment the defendant in error should take and sell the engine, and pay the overplus, if any, to Conant & Co., the true relations of the parties must have been those of vendor and vendee, and not those of lessor and lessee, and that the sale must have been intended as an absolute one.

Now the agreement, as we have seen, expressly retained the title in the vendor till payment. It is wholly impossible for us to understand how this provision, if lawful in any case, is rendered void or voidable because a just and fair privilege is given to the vendee.

It was most important to Conant & Co., that if, after paying a large part of the purchase money they should make default as to a small portion only, they should be entitled to have the engine sold, and any surplus paid to them. The effect of such a provision was, in such an event, to protect them against a heavy forfeiture. This provision did not tend to defraud either them or their creditors, but was beneficial to both.

We are perfectly content that the agreement be called a lease, or a conditional sale. The provision that the engine be sold in default, and the surplus paid to Conant & Co., does not tend to impeach the force of the contract, by whatever name it may be called.

Again, it was insisted below that the rule adopted by the Supreme Court of Illinois declared the policy of the state, and that all persons buying property within the state were bound to observe that policy.

We deny the soundness of such proposition. The Supreme Court simply interpreted a principle of the common law or the commercial law. And on such questions the Federal Courts must judge for themselves. The common law can not be different in one state from another in the absence of statutory rules.

Defendant in error resided in Rhode Island; Conant & Co., in New York, and the contract was executed in those states. The relations of the parties under the contract depended on the laws of the states where it was made. If the laws of Rhode Island and New York, when applied to the agreement, did not vest the title in Conant & Co., but held them as mere bailees, that relation followed them to Illinois, unless some positive provision of local law changed their status.

Black vs. Zacharie, 3d Howard, 483.

There was no rule of Illinois law which operated to divest the title of defendant in error. In fact the question at issue is one of commercial law. The kind of contract now being considered is almost universal in this country. The record shows that the manager of plaintiff in error, who purchased in the engine, had official knowledge that his own company had a large number of engines held by just such contracts under the defendant in error.

The case of March vs. Wright, 46 Ills., 488, is the principal one relied upon by the other side. An examination of that case will show that the rule contended for was not a settled one in Illinois. The very cases cited by the court show that there was not a full consideration of the question. One of these is Jennings vs. Sage, 13 Ill., p. 613. In that case the Court makes the very distinction for which we now contend. It says: "This was a case of fraudulent sale—of possession ob-
"tained fraudulently, in a case where the vendor intended to have the
"title pass with the possession. It was not a conditional sale where
"possession is given but title is not intended to pass with possession.
"It is insisted that as between plaintiff and Jennings, the law is that
"as between them,both parties being innocent, the loss should fall on
"the owners who, by intrusting Van Valin with the possession, enabled
"him to commit a fraud. This is unquestionably the law where owners
"with the intention of sale have voluntarily parted with possession.
"But this principle *does not apply to sales on condition*, and where the
"original owners have never consented to the transfer of the property."

The case of Bundage vs. Camp, 21 Ill., 330, is also relied upon in March vs. Wright, as authority for the conclusion there reached. Yet in that case the Court say: "This is a case where the plaintiff with "the intention of selling, or changing the title, parted with the pos- "session relying on the vendee to give a second note at a future day, "and is like in its principle to the case of 13 Ill., 613.

Reference is also made to McCormick vs. Haddon, 37 Ill., p. 371.

In that case horses had been sold by one brother to another, with the agreement that a chattel mortgage should be made by the lat ter for the purchase money. The mortgage was not made, and the vendee, after the lapse of a year, mortgaged the horses to a third party. The very fact that the brother who purchased was to execute a mortgage was evidence that the title was intended to pass to him from the beginning; and it might well be held that the vendor, by not taking a mortgage for such a length of time, had waived the condition, and looked to the credit of his brother for the money.

Ketchum vs. Watson, 24 Ill., 591, is also relied upon in support of the doctrine of March vs. Wright. Nothing could be farther from the truth. In Ketchum vs. Watson an absolute sale was made with delivery. The purchaser could not pay, so a re-sale was made, but not a re-delivery, and the property was held to remain in the first purchaser, as to third parties.

We thus show that the rule was not settled in Illinois at the time when this agreement was made, for March vs. Wright, ill considered as it was, and in conflict with the very cases relied upon to support it, can not be regarded as settling the law. It requires something more than this to change the relations of parties lawfully created in other states. The defendant in error, residing in Rhode Island, can not be held guilty of violating the practice policy of Illinois, with respect to a mere rule of commercial law. This Court, while paying all respect to state courts as to matters peculiarly within their jurisdiction, will

settle the principles of the common law and of the law of commerce for itself. As to the effect of the conditional sale being as we contend, the weight of authority is overwhelming.

Chancellor Kent says, vol. 2, p. 497: "When there is a condition "precedent attached to a contract of sale and delivery, the property "does not vest in the vendee on delivery until he perform the condi- "tion."

Hilliard on Sales lays down the same rule, vol. 3, sec. 2.

Mr. Judah P. Benjamin, in his late work on sales says: "When "the buyer is by the contract bound to do anything as a condition, "either precedent or concurrent, on which the passing of the property "depends, the property will not pass until the condition be fulfilled, "even though the goods may have been actually delivered into the "possession of the buyer."

And he cites among other cases the old one of Mires vs. Socsly, 3d Camp., p. 92, in which the rule thus stated is applied against an innocent purchaser.

That such an agreement is good between the parties is admitted by the Supreme Court of Illinois. We will not therefore trouble the Court with authorities on this point. But the authorities are quite as numerous in support of the proposition that such an agreement is good against every body.

Patton vs. McCave, 15 B. Monroe, p. 555, Kentucky.

Tomlinsons vs. Collins, 20 Conn., 364, 2 Pickering 512, and 4 Pickering 449, Mass.

Haven vs. Emory, 33 N. H., 66.

Buckmaster vs. Smith, 22 Vermont, 203.

Buson vs. Daugherty, 11 Humphrey, 50.

Strong vs. Taylor, 2 Hill, N. Y., 326.

Reed vs. Upton, 9 Pickering, 156.

Little vs. Page, 44 Mo., 412.

Forbes vs. Marsh, 15 Conn., 384.

Armington vs. Houston, 38 Vermont, 448.

Ballard vs. Boguett, 47 Barber, 648.

Whitney vs. Eaton, 15 Grey, (Mass.) 225.

Bucher vs. Hall, 15 Iowa, 277.

Humble vs. Ackly, 12 Iowa, 27.

Sargeant vs. Gile, 8 N. H., 325.

Sambling vs. Read, 1st Miss., 281.

Porter vs. Pettingall, 12 N. H., 299.

Parsons on Contracts, 441.

Story on Sales, Sec. 313.

The decisions of the Federal Courts are to the same effect.

Copeland vs. Barrett, 4 Wash., Circuit Court Cases, 594.

DeWolf vs. Babbett, 4 Mann., 294.

Gayler vs. Dyer, 5 Cranch, C. C., 461.

In re Lyon, decided by District Court of Wis., reported in vol. 4, p. 421, Chicago Legal News.

We do not know how far we might multiply these cases. Enough has been done to show how well settled the principle is for which we contend. A word as to the last point made below, viz.: That defendant in error was too slow in taking possession of the engine.

The contract was made May 11, 1871. The first note fell due Feb. 24, 1872. (Printed record, p. 10.) On the 16th day of Dec., 1871, the attachment was levied. (Printed record, p. 21.)

There is not a word to show that defendant in error ever heard of the attachment; to which it was not a party. The officers of the defendant lived at a great distance. They understood the R. R. Co., which had seized a great part of the property left by Conant & Co., would finish and perform the contracts of the latter. And with this understanding they sent their bill to the R. R. Co., in July, 1872.

But the plaintiff in error and Rudy must have known that there was something wrong when they bought the engine. It sold for upwards of $12,000 in May, 1871, and only ran till Dec., when it was

seized by the sheriff. Yet Rudy bought it for $1,000, and re-sold it to Smith for plaintiff in error for $3,500, on the same day. Why did not Smith bid first instead of buying it from Rudy? The whole attachment debt did not yet amount to $2,500, interest, costs and all. Rudy sold for nearly four times his bid instantly.

The fact is that while Smith and Rudy say they did not know of this contract, they must have known that they were not buying a good title. Somebody was being cheated. Smith's own company held a number of engines by the same kind of a contract from the same manufacturer. He knew he was buying at a sale under attachment, and took only the interest of the debtor. It is not for either of these men to say that defendant in error was guilty of laches. The sale was under a special execution which derived its force only from the prior attachment to which it related back. That attachment was almost a year old. The rights of the purchasers are to be determined by the state of things existing when the levy was made, and at that time there was not even a dollar due on the engine. Defendant in error had no reason to take possession. It did not know that Conant & Co. owed a dollar to the plaintiff in attachment, even if it had known that such a writ had issued. The judgment in attachment was not rendered for almost a year after the levy.

It is enough for us to say on this point that the purchasers obtained just such interest as the debtor had in the property when the attachment was levied upon it, and no more.

Drake on Attachment, Sec. 3, and cases there cited.

HAY, GREENE & LITTLER,
of Counsel for Defendant in Error.